IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ANTHONY GRAVES	§
	§
	§ CIVIL ACTION NO. G-00-221
	§
DOUG DRETKE,	§
DIRECTOR, TDCJ-CID	§

REPORT AND RECOMMENDATION

Now before the Court are the two remaining issues raised in Petitioner Anthony Graves' Petition for a Writ of Habeas Corpus and Graves' Motion to Abate. On September 6, 202, the District Court denied all of the claims filed by Petitioner, who was convicted of capital murder and sentenced to death in the 23rd District Court of Brazoria County, Texas in November, 1994. The District Court subsequently denied Petitioner a Certificate of Appealability ("COA"), and Graves sought a COA from the United States Court of Appeals for the Fifth Circuit.

On August 15, 2003, the Fifth Circuit granted this request on the sole issue of whether the State violated *Brady v. Maryland*, 373 U.S. 83 (196 3) when it failed to disclose a statement by Robert Carter that Graves was not involved in the murders for which Graves was eventually convicted. *Graves v. Cockrell*, 351 F.3d 143 (5th Cir. 2003). Three months later, the Fifth Circuit issued a second opinion granting a COA on a Brady claim involving Carter's declaration that his wife Theresa (also called "Cookie") committed the murders with himself and Graves. The Fifth Circuit directed the District Court to hold an evidentiary hearing to determine: (1) the

substance of Carter's statements; (2) the degree to which Graves was aware of them or used due diligence to discover them; (3) their materiality under Brady; and (4) whether Graves is entitled to habeas relief on these two claims. *Graves v. Cockrell*, 351 F.3d 156 (5th Cir. 2003).

A two-day evidentiary hearing was held beginning on September 28, 2004, after the District Court referred this case to the Magistrate Judge. Having carefully considered the hearing testimony, Petitioner's post-hearing brief, the state record, and the transcript of Graves' trial, the Court issues its Report and Recommendation to the District Court.

Background

In light of the thorough discussion of this case's background in the Fifth Circuit's initial ruling and in the District Court's Order denying habeas relief, the Court highlights only those facts immediately relevant to its decision. In the early morning hours of August 18, 1992, Bobbie Davis, Nicole Davis, Demitra Davis, Brittany Davis, Lea'Erin Davis, and Jason Davis were murdered in Burleson County, Texas. Bobbie and Nicole both suffered wounds from a knife, a hammer, and a .22 caliber gun. The remaining four children, aged four to nine, were stabbed to death. Robert Carter, the father of four year-old Jason Davis, was soon arrested for his involvement in the killings. He was subsequently convicted in 1994 of capital murder and sentenced to death.

Carter's wife, Cookie, was also indicted for the offense of capital murder. Attorneys Calvin Garvie and Lydia Clay-Jackson, who defended Graves at trial, believed this indictment to be a sham based on false evidence presented to the grand jury and obtained only in order to pressure Carter to testify against Graves. Evidentiary Hearing Transcript ("EHT") at 129,168. Nevertheless,

Burleson County District Attorney Charles Sebesta, who prosecuted Graves, insisted that the State believed from early on that Cookie participated in the killings and that all evidence pointed to the involvement of three people Id. At 57,98. Indeed, the State's theory from the beginning of the trial was that at least three people had acted together in the murders. Id. at 174. Texas Ranger Coffman testified at trial that his investigation showed "at least three and possibly four" perpetrators were in the Davis home when the murders occurred. Trial Transcript ("TT"), vol. 38 at 3728.

Prior to the beginning of Graves' trial, the District Attorney's office had been in negotiations with Carter and his appellate attorney for Carter's testimony against Graves. According to Sebesta, no final agreement on the terms had been reached prior to Carter's arrival in Brazoria County for Graves' trial, although any final plan was to involve the use of a polygraph exam before he testified. Id. At 51. The early discussions also involved Carter's condition that the State would not ask him questions about his wife's role in the murders. Id. At 54.

Sebesta met with Carter in the early evening of October 21, 1994. According to Sebesta, Carter almost immediately claimed, "I did it all myself, Mr. Sebesta. I did it all myself." Id. At 60. When Sebesta stated that he knew that was not true because of the number of weapons used, Carter quickly changed his story and claimed that he committed the murders with Graves and a third man called "Red." Id. At 61, 94, 95. Carter had earlier implicated a person named "Red" during the murder investigation, and the State believed that Theresa Carter may have been known by that nickname. Petitioner's Ex. 9. At 24. When Sebesta proposed that "Red" was actually Cookie, Carter denied it and agreed to take a polygraph exam. EHT at 95.

Since the polygraph examiner had been out sick that day, he

was called to come in to administer the exam. Id. At 96. The report states that Carter signed a polygraph release statement, had the exam explained to him, and then changed his story once more before the exam was given by stating that he had killed the Davis family with Graves but without "Red." Petitioner's Ex. 9 at tab. 4. The interviewer then posed the following questions to Carter: (1) "[W]as your wife, Theresa, with your [at the time of the murders]?" and (2) "[W]hen you refer to "ed in your statement, are you talking about your wife, Theresa?" Id. Carter answered "no" to both questions. The polygraph examiner concluded that Carter was not being truthful in either response. Id. When the polygraph results were explained to him, Carter once more changed his story. He now admitted that Cookie was involved in the murders with himself and Graves. He also stated that he had invented the character "Red" but later admitted that Cookie was sometimes called "Red." Id. When Sebesta asked him if Theresa had used the hammer in the murders, Carter answered "yes". EHT at 96.

In addition to the tentative deal to forego questions about Cookie in exchange for testifying against Graves, the State had also been working on a broader agreement that would allow Carter to accept a life sentence rather than death if his case were reversed on appeal. This required Carter to testify against both Graves and Cookie. Id. At 67. By the time the October 21 meeting concluded, he had tentatively assented to do so, though no final agreement was reached. Id. At 62, 103, 105. The next morning, however, Carter refused to testify against Cookie and reverted to the initial terms already worked out with the State. Both Carter and Sebesta then accepted the tentative agreement as the final deal for his testimony.

At the evidentiary hearing, Garvie denied that he knew before, or at anytime during, trial that Carter had told Sebesta he killed the Davis family himself. Sebesta testified that he mentioned to Garvie on the morning Carter testified. Id. At 149. The Court accepts

Garvie's version of this event based on his credibility as a witness and as being consistent with his vigorous defense of Graves at trial. Sebesta did reveal part of the polygraph results on the morning of October 22 when he told the trial judge: "last night at 8:30 Mr. Carter took a polygraph[,] and the basic question involved his wife, Theresa. It shows deception on that polygraph examination. But, obviously, we can't go into polygraphs here, but I think counsel is certainly entitled to know that." TT, vol. 35 at 3360. Garvie asked no questions about what the polygraph involved. Garvie's co-counsel testified that it did not occur to the defense to inquire into Sebesta's statement because they believed the indictment against Cookie was unfounded. EHT at 134. Nor did it fit the defense's theory of the case. According to Ms. Clay-Jackson, the defense thought that at least two people were involved in the killings but that Cookie was not one of them. Id. At 122. The State then called Carter to the stand and revealed to the jury that he was testifying in exchange for an agreement that questions would not be asked about his wife. TT, vol. 35 at 3429.

Graves' habeas attorney appear to have first learned of Carter's statement, "I did it all myself," in 1998. On June 19, 1998, Graves' former attorney took a deposition from Carter in which he claimed to have acted alone. *Ex parte Graves*, No. 40,812-01 at 97ff. That statement was excluded from the record by the state curt as inherently unreliable because Graves' attorney failed to notify the State, as required by law, in order to allow cross-examination. Carter agin recanted his trial testimony in a May 18, 2000, deposition attended by both Sebesta and Graves' current counsel. Sebesta later appeared on the Geraldo Rivera show Deadly Justice on September 3, 2000, and repeated Carter's self-confession. Sebesta stated: "yes, and at that point he [Carter] did tell us, 'Oh, I did it myself. I did it.' He did tell us that." Petitioner's Ex. 1.

Standard of Review

The due process rights of the Fourteenth Amendment prohibit a prosecutor from suppressing evidence that is favorable to a defendant under certain conditions. *Brady*, 373 U.S. at 87-88. However, the exclusion of favorable evidence does not in itself automatically entitle a petitioner to habeas relief. In order to establish a *Brady* violation, Graves must demonstrate that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to him; (3) it was material either to guilt or punishment; and (4) nondiscovery of the evidence did not result from a lack of due diligence. *Rector v. Johnson*, 120 F.3d 551,558 (5th Cir. 1997). Evidence is material only if there is a "reasonable probability" that the result of the proceeding would have been different if the

evidence has been disclosed. *United States v. Bagley*, 473 U.S., 667, 682 (1985); *Jackson v. Johnson*, 194 F.3d 641, 649 (5th Cir. 1999). Reasonable probability is defined as a probability "sufficient to undermine confidence in the outcome of the trial." *United States v. Nixon*, 881 F.2d 1305, 1308 (5th Cir. 1989). However, the *Brady* standard is not a result-oriented test of the sufficiency of the evidence produced at trial. *Spence v. Johnson*, 80 F.3d 989, 994 (5th Cir. 1996).

Suppressed evidence that is cumulative to other evidence, or that has only incremental impeachment value, does not meet the materiality standard. *Drew v. Collins*, 964 F.2d 411, 419-20 (5th Cir. 1992). A court must examine the combined effect of the evidence that was withheld and not look at each piece of suppressed information only in isolation. *Kyles v. Whitley*, 514 U.S. 433, 436 (1995). In doing so it must assess the evidence "in terms of the potential effects of undisclosed information on a judge's or jury's assessment of guilt." *Matthew v. Johnson*, 201 F.3d 353, 361 (5th Cir. 2000).

The Court stresses this legal standard because Graves' attorneys claim that Petitioner need only show that the trial result *could* have been changed had the statements at issue been disclosed. Petitioner's Brief at 4. Petitioner would be correct if his claim were perjury-related, *Barrientes v. Johnson*, 221 F.3d 741, 756 (5th Cir. 2000), but Petitioner has only complained of non-disclosure. In *Kyles, supra,* the Supreme Court observed that harmless error analysis is applicable to a *Brady/Giglio* claim arising in a habeas case outside the perjury-related context.[13] In such a case, *Brady* demands more than the mere possibility, or even the likelihood, the outcome could have been different. While similar to the materiality standard of *Giglio v. United States*, 405 U.S. 150 (1972), which prohibits the intentional use of false evidence, *Brady's* relevant materiality requirement is a more stringent standard than *Giglio's* test that there be a "reasonable likelihood" that the outcome would have been different. *Barrientes*, 221 F.3d at 756. Instead, it is identical to the more demanding prejudice requirement for showing ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 688, 694 (1984). *Martin v. Cain*, 246 F.3d 471, 477 (5th Cir. 2001).

Discussion

Carter's Own Admission

This Court finds that Sebesta did not reveal Carter's statement that he committed the murders himself. The Court can only hope that the reason for his nondisclosure was the prosecutor did not believe it was credible. EHT at 72. Regardless, Sebesta's personal

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13 Petitioner has not complained of Carter's perjured testimony during redirect examination that every story he had told except his grand jury testimony had implicated Graves. TT, vol. 35 at 3456-57. The Court, therefore, does not address any claim that Petitioner's conviction was obtained by the knowing use of perjured testimony.

belief about the truth of Carter's statement was irrelevant. The comment was exculpatory on its face, and even acting in good faith did not relieve Sebesta of his *Brady* obligations. *Rector*, 120 F.3d at 558. Since Graves' attorneys had no way of knowing what Carter had said and were given no indication that relevant information was available, they had no reason to exercise due diligence to discover it.

The only issue, then, is whether or not Carter's statement is material. Petitioner claims that the statement's timing makes it material. He appears to argue that Sebesta only proposed the testimonial agreement in the October 21 meeting after Carter failed the polygraph exam. According to this account, failing the exam changed the dynamics of the negotiations in that Sebesta pressured Carter to testify against his wife in a police "interrogation." Petitioner's Brief at 8-9. It was only the deal to protect Cookie, Petitioner alleges, that induced Carter's testimony against Graves, and Carter would otherwise have testified that Graves was innocent. Id. at 9. This echoes one of the principal concerns expressed by the Fifth Circuit, which had allegations before it that Carter only changed his testimony to implicate Graves as a result of the State's agreement.

Petitioner's version of events is incomplete. The evidentiary hearing showed that Carter did not change his story from "I did it all myself" to one that implicated Graves in order to strike a deal with the State. Discussions concerning Carter's testimony against Graves had been ongoing for several months before the trial began. Sebesta, an assistant district attorney, Coffman, and Carter's appellate attorney visited him in prison twice in the summer of 1994 to discuss the terms of Carter's testimony. EHT at 50-51. On September 8, 1994, almost six weeks before Carter testified, Sebesta told the trial judge and Graves' attorneys that a tentative agreement had been worked out for Carter to testify against Graves

in exchange for not being asked questions about Cookie. TT, vol. 8 at 3-4. Although Sebesta stated at the hearing that no final agreement had been reached at that time, EHT at 51, the trial record shows these were the conditions initially agreed to by Carter and the State.

There is no evidence that the terms of the initial agreement were in question, or that Carter had no reason to believe they were, when he spontaneously told Sebesta at the beginning of their meeting that he had acted alone. Sebesta testified that this remark did not change the prosecution's position on the deal, and nothing suggests Carter thought otherwise. EHT at 60. Petitioner's repeated suggestion that Carter backed down from his exculpatory statement in response to some pressure by the State to prosecute Cookie, or in an effort to resurrect the terms of the tentative agreement, is simply unfounded. The agreement had been worked out over a period of time and was fully available to Carter both before and after he made the statement at issue here.

The evidence shows that Carter freely recanted his "I did it all myself" statement when Sebesta pointed to the evidence that showed that more than one person must have been involved. He also freely, and quite quickly, reimplicated Graves together with "Red." EHT at 61, 94-95. Contrary to Petitioner's version, this recantation occurred before the polygraph was administered. After failing the polygraph, Carter again implicated Graves, this time with Cookie. While Carter may have been motivated to testify against Graves in the first place in order to protect Cookie, this was well known to his attorneys by the time Carter testified and was fully revealed to the jury. Graves' attorneys had ample opportunity to attack Carter's motives at trial, and the jury was able to assess his credibility in light of the deal's term.

The defense relied primarily on two things at trial: alibi

testimony and impeachment of Carter's credibility. Ms. Clay-Jackson testified that disclosure of Carter's statement would not have affected the alibi evidence, the most important part of which the state court found "the jury obviously did not believe." *Ex parte Graves*, No. 73,424 at 12. Therefore, the strongest benefit of Carter's statement to the defense lies in its impeachment value. This could rest on at least two grounds: (1) Carter's trial testimony against Graves could have been attacked as unreliable on the theory that the self-confession was a more credible version of events, or (2) it could have been attacked as unreliable because, in light of the exculpatory statement, there were simply too many stories to make any of them credible.

Petitioner claims that if Sebesta had revealed the exculpatory statement, Carter would have testified that he acted alone and that his testimony would have been inherently believable to the jury. Ms. Clay-Jackson confirmed this by stating that the defense could have counted on the statement's reliability and taken Carter through the murders step by step on this basis. EHT at 131. But even assuming that grand assumption, Petitioner has not shown that his statement would have had such an effect on the jury that it undermines confidence in the trial's outcome. The exculpatory statement fitted neither the State's three-person theory (which the jury heard) nor the defense's belief that at least two people were involved. Both trial attorneys testified that the number of victims and weapons used made it reasonable to conclude that more than one person was involved. Id. at 125, 162. It is difficult to see why there is a reasonably probability a jury would have believed Carter acted alone when Graves' own counsel admit it was reasonable to find otherwise. Obviously, Carter's testimony that he and Graves did the deeds themselves does not fully match the three-person theory, but the jury also knew that Carter was protecting Cookie. Nevertheless, Petitioner argues that the jury would have credited the October 21 exculpatory statement over pre-trial claims

implicating Graves because Carter made those earlier statements in an attempt to avoid prosecution. Petitioner's Brief at 9. The facts show this cannot be true. Carter went to trial in January/February of 1994. TT, vol. 38 at 3691. He had already been convicted and condemned to death when he confessed to Coffman on October 2, 1994 and when he reached an initial agreement to testify against Graves. There is no evidence the State ever agreed to drop the death penalty in exchange for Carter's testimony against Graves alone. Carter's self-confession was not the persuasive evidence Petitioner claims.

Petitioner insists that Carter's May, 2000 deposition, which recanted his trial testimony, must be considered here. Petitioner's Brief at 18. Presumably, Petitioner is claiming that Carter would have given cross-examination testimony identical to the 2000 statement and that this new version of events would have been credible to the jury. This is a difficult argument to make. The materiality of *Brady* evidence depends "on the value of the evidence relative to the other evidence mustered by the State." *Smith v. Black*, 904 F.2d 950, 967 (5th Cir. 1990). The 2000 deposition was not part of anyone's trial evidence and is not properly part of the materiality analysis. Even if it were and Carter had given the same testimony at trial, Petitioner overlooks the fact that Carter's statement contradicts the medical evidence. In the 2000 statement, he alleged he made an "attempt to hit [Nicole Davis] in the head with the hammer but she woke up and that's when I had to use a gun." Deposition at 34-35, 37. In neither the 1998 nor the 2000 depositions did Carter recall using a knife on Nicole or actually hitting her with the hammer. *See Ex parte Graves*, No. 40,812-01 at 112. In reality, Nicole suffered three knife wounds to the face and abdomen, three hammer blows to the head, and five gunshot wounds. Recantation testimony is viewed with extreme skepticism under federal and state law. *United States v. Adi*, 759 F.2d 404, 407 (5th Cir. 1985); *Chavez v. State*, 6 S.W.3d 56, 62 (Tex.Crim.App.

1999). It must therefore be elicited with great care. Graves' attorneys, who took the deposition and had the benefit of seeing the inadmissible 1998 statement, should have, if possible, accounted for these discrepancies while interviewing Carter. Given that his statement matches neither the medical evidence nor Coffman's undisputed testimony that at least three people were involved, Petitioner has not demonstrated materiality.

Graves further argues that the exculpatory statement had potential value to the defense because Carter had earlier exonerated him before the grand jury. Garvie testified that he would have considered the statement important because it could have confirmed that Carter's grand jury testimony was accurate. EHT at 150. This overlooks the fact that the October 21 claim contradicted Carter's grand jury testimony that he himself was also innocent. It also ignores the fact that Carter gave the trial jury grounds to dismiss the credibility of his grand jury testimony. He stated that he had lied before the grand jury and had done so because Graves threatened him while they were housed in the Burleson County jail. TT, vol. 35 at 3431, 3437. The State presented independent evidence of threatening statements by Graves to Carter while they were in jail such as "Yeah, motherfucker, I did it, keep your mouth shut" and "Keep your damn mouth shut. I done the job for you. Make them make their own damn case." Id. At 3864, 3879. These comments were made on August 25, 1992, the day before Carter's grand jury testimony and could have been construed by the jury to confirm Carter's account of why he exonerated Graves the next day. The jury clearly credited his trial testimony over the grand jury statements because it found Graves guilty. It is a difficult leap to say that the October 21 confession would have affected the jury so much that it would have disregarded Carter's explanation as to why he lied to the grand jury. The difficulty is heightened by the fact that the October 21 statement was inconsistent with every other version of events Carter had given, including the grand jury

testimony itself.

Both of Petitioner's trial attorney's stated that the exculpatory statement could also have been used to impeach Carter's credibility as a witness. Unfortunately, Graves' habeas attorneys do not address this issue. Nevertheless, the impeachment value depends on placing the comment in the context in which it occurred. The jury learned that Carter had given at least three different versions of who participated in the murders before he testified at trial. A transcript of an investigative interview between Carter and Ranger Coffman that took place shortly after the murders was read at trial in which Carter denied his own involvement and accused Graves. TT, vol. 37 at 3585ff. Grand jury testimony was read into the record in which Carter recanted his previous statements to Coffman and swore under oath that neither he nor Graves had been involved. Id. at 3618ff. A third transcript of an October, 1994 conversation between Coffman and Carter taken after his conviction was also read in which Carter stated that he and Graves acted together with "Red." Id., vol. 38 at 3693ff. A complete inventory of all Carter's versions by the close of trial includes the following:

1. Graves did it alone (1992 statement to Coffman);
2. Neither Carter nor Graves did it (1992 grand jury testimony);
3. Carter did it with Graves (1994 pre-trial negotiation statements);
4. Carter did it with Graves and "Red" (October 2, 1994 statement to Coffman);
5. Carter did it alone (October 21, 1994 statement to Sebesta);
6. Carter did it with Graves and "Red"(id.);
7. Carter did it with Graves (pre-polygraph statement of October 21, 1994);

8. Carter did it with Graves and Cookie (post-polygraph statement to Sebesta);
9. Carter did it with Graves (trial testimony).

The jury heard versions 1, 2, 4, and 9 and heard Carter admit that he had given a different, though unspecified, account at his own trial. Id., vol. 35 at 3453. It also heard multiple attacks on Carter's credibility from the defense and admissions from Carter himself. In the grand jury transcript, he stated that he had lied to Coffman in the investigation. Carter then said he had given false testimony before the grand jury. Id. At 3431, 3437. He admitted that he might lie to avoid the death penalty. Id. At 3454. Even State witness Coffman admitted Carter had lied "a lot." Id., vol. 38 at 3775.

Although it is certainly possible that one more version might have led the jury to reach a different conclusion, it is clear that the jury overcame serious questions about Carter's credibility as a witness in order to find Graves guilty. Carter told the jury he had previously given four to five different accounts and that his current testimony differed from the story at his own trial. Id., vol. 35 at 3440. The jury also knew the terms of Cater's agreement with the State and the motive that might have given him for testifying against Graves in order to protect his wife. The defense had versions 1, 2, and 4 listed above, plus the unspecified version at Carter's own trial, to impeach the credibility of number nine. In light of the fact that Carter's claim to have acted alone contradicted the evidence, and the fact that the jury already had considerable evidence before it of Carter's multiple inconsistencies and credibility issues, the Court cannot find that it is reasonably probable that disclosing that statement would have led to a different outcome.

Under these facts, Carter's self-confession could be material to Graves' defense only if it is considered in combination with

Carter's other claim that he killed the Davis family with Graves and Cookie. For the reasons stated below, the combined effect of the two statements does not lead to a different conclusion.

Carter's Second Admission

Petitioner argues that the materiality of the statement implicating Cookie has already been decided by the Fifth Circuit because the remand orders establish the law of the case on this point. Petitioner's Brief at 6. This cannot be true since one of the purposes of remand was for the District Court to determine materiality. However, the second remand order raises a more serious law of the case issue. The Fifth Circuit remarked that although Cookie had been indicted, "the state's position was that she was involved after the fact." *Graves*, 351 F.3d at 158. Insofar as this important statement falls within the law of the case doctrine, its reexamination would ordinarily be barred at this point. *Alpha/Omega Ins. Services, Inc. V. Prudential Ins. Co. Of America,* 272 F.3d 276, 279 (5th Cir. 2001).

That doctrine, however, is subject to exceptions, including when evidence produced in a subsequent trial or hearing is substantially different from the finding in question. *Lyons v. Fisher*, 888 F.2d 1071, 1075 (5th Cir. 1998). In the hearing, Sebesta specifically rebutted the conclusion that the State only suspected Cookie was an after-the-fact accomplice. When asked if the State's theory was that Cookie was "actively a participant" in the murders, he responded: "It was our theory that were [sic] was an active participant and from very early on because she was indicted . . .at the very same time that Carter and Graves were indicted." EHT at 57. It is clear that by "active participant" Sebesta meant that Cookie directly took part in the killings as Carter admitted on October 21 because the same phrase was immediately used in the hearing to describe what Carter had actually said. Id. Sebesta also testified that Carter's statement that he had committed the crimes

with Graves and Cookie was "absolutely" consistent with the State's theory. Id. at 98.

Sebesta's testimony also matches other aspects of this case. As outlined above, the State consistently presented a theory to the jury that at least three persons were actively involved in the murders. TT, vol. 38 at 3728. Sebesta repeated Ranger Coffman's testimony on this point in his closing arguments. Id. Vol. 42 at 4202-03. Even Petitioner himself specifically claimed in the federal habeas petition that the State believed Cookie "was one of the participants actively involved in these killings, and they had indicted her as such "and that her active involvement "is an undisputed fact." Habeas Petition at 141. The Court therefore finds that the law of the case doctrine does not forbid the conclusion that the State believed Cookie was an active participant in the Davis murders.

Unfortunately, Graves' habeas attorneys fail to address one of the key *Brady* points posed by the Fifth Circuit: whether the nondiscovery of Carter's statement about Cookie resulted from a lack of diligence. After reviewing the records in this case, the Court finds that even though Graves' trial attorneys otherwise ably defended him, Sebesta's in-court statement was not so vague in light of the surrounding circumstances that they should not have inquired into it further. Both trial attorneys stated that it did not occur to them that Cookie was involved because her daughter Tremetra Ray, was prepared to testify that Cookie was at home when the murders took place. EHT, 112, 122. The defense attorneys should have known what Ray was prepared to tell the jury and that her version of events was a weak basis for this conclusion. Ray actually testified that Carter and her mother were at home together on the night of the murders. TT, vol. 41 at 4135. In light of the fact that Carter had already been convicted and was, in fact, about to admit his guilt at Graves' trial, Ray's testimony could not have been compelling reason to ignore Sebesta's in-court revelation. Cookie's 1992 indictment, the terms of Carter's

testimony agreement, and the weakness of Ray's alibi testimony should have alerted the defense attorneys to look more closely at Sebesta's on-record statement that Carter had lied about Cookie. The fact that her active participation would disrupt the defense's version of events was not sufficient reason for remaining silent when the defense learned that the key witness against their client may have made false statements about his wife's involvement. Regardless of the defense's theory, due diligence, if not simple curiosity, should have prompted some inquiry during the hearing.

Even if due diligence were not an issue, Carter's statement is not exculpatory. Both of Graves trial attorneys admitted it was not exculpatory on its face, and it is easy to see why: the statement directly implicates Graves himself. EHT at 117, 158. Nevertheless, Petitioner argues that Carter's statements was material and exculpatory because the State believed "at least two persons" committed the murders. He claims evidence that Cookie was one of the killers would have significantly weakened the argument that Graves was also involved because it accounted for the two-person scenario without him. Petitioner's Brief at 14-15. Petitioner's argument works only if "at least two persons" is construed to mean that "only two persons" were responsible for the Davis murders. Had the prosecution believed that only two people were involved, then Carter's statement would have been material because it could have deflected suspicion away from Graves as the second killer. But the State never presented such a theory to the jury. It consistently believed that at least *three* persons were involved and presented its case accordingly. EHT at 98. Carter's statement implicating Graves and Cookie fit that theory and would not have been exculpatory on the basis Petitioner argues. Garvie confirmed this at the hearing by admitting that any implication of Petitioner and cookie together would not have helped the defense. EHT at 173. The fact that Carter's statement matched up with the State's three-person theory could even have lent it credibility, which would

have been damaging to Petitioner.

The statement could also have harmed Petitioner's attack on the State's motive theory. The State believed that Graves was motivated, in part, by his close relationship with Cookie, who was his cousin. The defense used Tremetra Ray to show that the two cousins were not close at all. As stated above, however, Ray's testimony contained the central claim that Cookie and Carter were at home together when the murders occurred. Carter's confession that Cookie was involved would have directly contradicted this and could have led the jury to question Ray's credibility as a defense witness even more than it did.

Much of Petitioner's argument implies that he was unable to raise questions in the jury's mind about Cookie because Carter's statement was not disclosed. This overlooks the nature of the testimonial agreement itself. Obviously, the State could not limit the defense's ability to cross-examine Carter about Cookie if they so desired. The agreement only limited the State's right to do so. Graves' attorneys knew the State had indicted Cookie; that it was arguing a three-person theory; that Carter was very eager to protect Cookie; and that he had agreed to testify against Graves only in exchange for not being asked questions about her by the State. The defense therefore had the freedom and the opportunity to cross-examine Carter about his wife's involvement.

The *Brady* evidence at issue here must also be examined to assess the combined effect if both statements had been disclosed. Although Petitioner's attorneys provide no argument on this issue, the disclosure of both of Carter's statements does not lead to a different conclusion. In fact, the combined effect could well have been damaging to Petitioner. The jury could not have believed both of Carter's contradictory claims. If they had been disclosed, this could have undermined any credibility the jury might otherwise

have given to Carter's allegation that he acted alone. Unlike that claim, the statement implicating Cookie and Graves identified the missing third person the State had argued was involved. Given that the defense itself did not believe one person committed the murders, it is very unlikely the jury would have believed Carter's one-person version when it also had his three-person story that matched the evidence. The jury could also have taken Carter's three-person statement as more credible because it was strongly against his well-known desire to protect Cookie. Moreover, if both statements had been raised on cross-examination, the State would presumably have been able to point to Carter's two additional October 21 versions that implicated Graves (numbers 6 and 7 above). This would have reinforced the consistency with which Carter had implicated Graves because, other than the exculpatory statement and the discredited grand jury testimony, all of Carter's accounts listed above named him as a participant in the murders. Carter's undisclosed statements do not meet the materiality standard when considered alone or in combination, and Petitioner has not shown a *Brady* violation in this case.

The Motion to Abate

Following the completion of the evidentiary hearing Graves filed a Motion to Abate. He asks the Court to abate the federal habeas proceedings so that he may return to state court to pursue and additional *Brady* claim based on a newly-discovered transcript of Cookie Carter's 1992 grand jury testimony. Texas courts allow successive petitions only under narrowly-defined circumstances. Tex. Code. Crim. Proc. Art. 11.071 § 5. This Court expresses no opinion as to whether Petitioner could meet those requirements on the new claim. However, Petitioner cannot pursue a new claim in state court while the federal proceeding is ongoing. The federal case must either first be resolved or abated. *Ex parte Soffar*, 143 S.W.3d 804 (Tex. Crim. App. 2004)

Although *Soffar* empowers state courts to hear successive issues if the previously-filed federal proceeding is abated, it has no effect on a federal court's jurisdiction over the case before it. State remedies for the two *Brady* issues at stake here have been exhausted, and the fact that Petitioner's attorneys believe they have recently discovered a third *Brady* claim has no direct bearing on this case. The new claim is factually distinct from the two under consideration. The discovery required to save the new claim from Texas' abuse of the writ doctrine is entirely separate from the evidentiary background of the instant issues. Petitioner does not allege that his ability to pursue his new claim in state court at a later point will be harmed if the federal case continues. By contrast, abating this proceeding would certainly delay the resolution of the two remanded *Brady* claims, which have been in litigation in federal court for over four years.

In support of this motion, Petitioner's attorneys have submitted supplemental briefing in which they argue that Cookie's grand jury testimony must be considered in combination with the *Brady* material discussed above. Petitioner argues that Cookies's testimony could have led defense counsel to suspect that she was the second party in their two-person murder scenario. Even assuming for the sake of argument that the unverified transcript is part of the record and should be considered in this context, the claim is unavailing. Cookie told the grand jury two relevant things: (1) Carter was innocent because he was at home with here when the murders occurred, and (2) Carter told here he wrongfully implicated Graves during the murder investigation because the Texas Rangers pressured him. In light of Carter's admission of guilt at Graves' trial, the first statement appears to be simply untrue. The second comment is cumulative evidence because Carter told the grand jury the same thing. The defense had access to that testimony. If the defense chose to ignore the State's indictment and not believe Cookie was involved, it was certainly not because her grand jury

testimony was suppressed. Although Petitioner has not exhausted his state remedies on this claim, the District Court may deny a habeas claim on the merits notwithstanding a petitioner's failure to satisfy the exhaustion requirement. 28 U.S.C. § 2254(b)(2).

CONCLUSION

For all the reasons stated above, the Court **RECOMMENDS** that Petitioner's Motion to Abate (Instrument No. 102) be **DENIED** and that the two *Brady* issues on remand from the Fifth Circuit also be **DENIED.**

This Clerk shall send copies of this Report and Recommendation to the Petitioner by the means in place for transmission of same. Petitioner shall have until November 22, 2004 in which to have written objections, filed pursuant to 28 U.S.C. § 636(b)(1)©), physically on file in the Office of the Clerk. The Objections shall be mailed to the Clerk's Office in Galveston, Texas 77553 at P.O. Drawer 2300. Any objections filed shall be contained in a written document specifically entitled "Objections to the Report and Recommendation of the Magistrate Judge", which will then be forwarded to the District Judge for consideration. Failure to file written objections within the prescribed time shall bar the aggrieved party from attacking on appeal the factual findings and legal conclusions accepted by the District Judge, except upon grounds of plain error.

DONE at Galveston, Texas this 8th day of November, 2004.

JOHN R FROESCHNER
UNITED STATES MAGISTRATE JUDGE